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No. 74-1025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

BURTICE A. HINES, ET AL., *Petitioners,*

v.

ANCHOR MOTOR FREIGHT, INC., ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT LOCAL UNION NO. 377

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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COUNTERSTATEMENT OF THE CASE

1. Parties

Petitioners are truck drivers formerly employed by the Respondent, Anchor Motor Freight, who, while so employed, were members of Respondent Local 377. Respondents Anchor and Local 377 are parties to a collective bargaining agreement, negotiated on a nationwide basis, called the National Master Automobile Transporters Agreement (A. 226).

2. Relevant contract provisions.

Article 32 of the collective bargaining agreement prohibits discharge of employees "without just cause" (A. 170). Employees are entitled to one written warning notice of any complaint "except that no warning notice need be given to an employee before he is discharged if the cause of such discharge is dishonesty * * * ." (A. 170).

The procedures established by the contract to review protested discharges are outlined in Article 32 and Article 7 (A. 218-224). This procedure includes the use of joint arbitration committees, organized on a geographical or area basis, and a national joint arbitration committee for appeals from deadlocked cases (A. 221). The decisions of the committees are final and binding by specific agreement of the parties (A. 224):

> "[Art. 7, § 7](c) Any decision of any of the joint arbitration committees referred to above, shall be final and conclusive and binding upon the employer and the union and the employees involved."

These committees are referred to as joint committees because they consist of an equal number of employer and union representatives (Article 7, Section 3(b)) (A. 220).

The final step in this grievance procedure requires the parties to submit deadlocked cases to an impartial or neutral arbitrator. The contract specifically states that deadlocked grievances "shall" be submitted to a board of arbitration which includes a neutral member (A. 223).

3. Discharge decision

On June 5, 1967 the employer discharged eleven drivers for dishonesty (A. 120). The alleged dishonesty consisted of submitting false receipts for reimbursement of room rent. The drivers maintained their innocence. Agents of Local 377 undertook their defense and presented the grievance locally with management. When that failed to resolve the matter a formal hearing was held pursuant to the contract procedures.

4. The Arbitration hearings

The first hearing was held in Detroit on Wednesday, July 26, 1967 (Ex. 9, A. 190-193). All of the drivers were notified of the hearing and attended (A. 104). Prior to the hearings the drivers met with the union business agents and told them their version of the facts (A. 29). When they discussed the registration records and the receipts which had been made available to the union, the drivers asserted that they had no control over the amounts which the motel operator put on the card, and insisted that they paid the actual amount shown on the receipts for which they were reimbursed by the employer (A. 30, 73, 80). The union agents believed that the drivers were correct and that it was the motel owner that was in error (A. 44).

The first hearing before the Joint Arbitration Committee lasted over four hours (A. 76, 138, 140). The Committee deliberated two hours before making its decision (A. 141). At this hearing the employer presented the receipts and registration cards and the statements by both Repicci, the motel owner, and Pagano, the motel clerk. A union agent spoke on behalf of the men, and each of the men spoke on his own behalf (A. 32, 38, 47). After the decision sustaining the discharges was distributed, the drivers asked the union agents whether they should get a lawyer and the union told them that they might as well (A. 31).

Subsequently, an attorney hired by the drivers obtained an affidavit from Repicci, the motel owner. No second affidavit was ever obtained from Pagano, the motel clerk who had allegedly falsified the receipts. On the basis of Repicci's affidavit the local union requested and was granted a rehearing which was held on October 26, 1967 (A. 210). These rehearing proceedings took over two hours (A. 147-148). Most of

the men attended the second hearing (A. 48, 109). The rehearing was denied unanimously by the Joint Committee (Ex. 11, A. 210). The only new evidence that had been offered was the affidavit of Repicci (A. 82-83).

5. Other proceedings—the National Labor Relations Board

The drivers then filed a charge with the 8th Region of the National Labor Relations Board alleging that the discharges resulted from concerted activities previously engaged in by the employees, and that the employer acted in concert with officers of Local 377 (A. 152-155). A charge was also filed with the National Labor Relations Board against Local 377 for breach of the duty of fair representation. These charges were investigated and dismissed for insufficient evidence (A. 269). Upon appeal, this dismissal was affirmed by the General Counsel of the National Labor Relations Board. He specifically noted that the Union had obtained reinstatement of the drivers pending arbitration; had obtained a rehearing to present the additional evidence obtained by their attorney; and that the drivers were present at both hearings and were allowed to present their own defenses. He concluded, accordingly, that "insufficient basis existed for a finding that the union failed to represent them properly." (A. 271-272).

6. Court Proceedings

a. The U.S. District Court

Petitioners filed a complaint in the U.S. District Court alleging that the discharges were without just cause. Jurisdiction was predicated on § 301 of the Labor-Management Relations Act (29 U.S.C. § 185).

The complaint alleged that the decision of the Committee resulted in an injustice because: (a) the proceedings were devoid of due process in that the contractual grievance procedures were not followed; (b) no proper notice of hearing was given the plaintiffs; (c) the discharges were sustained without evidence of wrongdoing; (d) the Committee failed on application for a rehearing to consider evidence absolving them of any wrongdoing; and (e) that the defendants knowingly used false information to sustain the discharges (A. 5-6). These allegations were denied by all respondents (A. 8-16).

Extensive discovery procedures were conducted by the parties. All parties took depositions and exchanged documentary evidence. This discovery demonstrated, without disagreement by petitioners, that the parties had followed the contractual procedures; that petitioners received notice of the hearing and attended in person (A. 30, 32, 38, 47, 109); that evidence both documentary and testimonial, was produced at the hearing; that the Arbitration Committee heard and considered the evidence offered on rehearing (A. 146-148); and that no false evidence was used by Local 377 in the arbitration process (A. 32, 81).

Based upon the depositions and documents produced during the discovery proceedings, a motion for summary judgment was filed by each of the defendants. The district court granted summary judgment based on its finding that the arbitration award was final and that the petitioners had failed to show facts "comprising bad faith, arbitrariness, or perfunctoriness on the part of the Unions." (App. to Pet., p. 4).

b. The Court of Appeals

Petitioners appealed the order granting summary judgment to the Sixth Circuit Court of Appeals. The proceedings in that Court resulted in a decision affirming that part of the summary judgment dismissing the employer and the International Union as parties.

However, the court reversed the order granting summary judgment dismissing the case against the local union, stating that "A case where questions of good faith or fraud are at issue should not be summarily decided without the taking of testimony unless it is clear that recovery cannot be had on any state of the evidence." (App. to Pet., pp. 14-15). The Court remanded the case for trial on this issue against the local union.

The petitioners filed for certiorari requesting this Court to review dismissal of the employer (Question 1) and dismissal of the International Union (Question 2) (Petitioner, p. 2). This Court limited its grant of the petition to Question 1.

SUMMARY OF ARGUMENT

The only question properly before this Court for review is whether it was error to dismiss the employer as a defendant in this action, on the basis of an arbitral award sustaining petitioners' discharges, notwithstanding that the claim of prejudicial unfair representation by their union in the processing of their grievances has been remanded for trial.

The teachings of this Court in *Humphrey* v. *Moore,* 375 U.S. 335, *Vaca* v. *Sipes,* 386 U.S. 171, and *Czosek* v. *O'Mara,* 397 U.S. 24, establish that, where the essence of the claim is that the employer discharged the complaining employees without just cause in breach of the collective bargaining agreement, then the respondent employer must defend the contract claim on its merits, notwithstanding a contractually final and binding arbitral award denying their grievances, provided that the discharged employees can prove that their union prejudicially breached its duty of fair representation in its handling of their grievances. Accordingly, the full vindication of collectively bargained contractual rights together with important remedial considerations preclude premature dismissal of the employer from such litigation.

ARGUMENT

THE COURT BELOW ERRED IN DISMISSING THE EMPLOYER AS DEFENDANT IN THIS LITIGATION

The Court of Appeals held that petitioners made a sufficient showing to entitle them to go to trial on their claim that Local 377 breached its duty of fair representation of them. It did not, of course, determine that those allegations had been established to be true. Yet petitioners' brief is written as if Local 377's guilt had already been determined, contrary to their own position, which prevailed in the Court of Appeals, that this issue could not be decided on a paper record. Rather than burden this Court by responding to petitioners' distorted description of Local 377's conduct with our own version of the facts, we ask the Court to bear in mind that the facts on the duty of fair representation issue are still in controversy. At the present stage of the proceedings, the only question before the Court is whether, since it has not been finally resolved that the union did not violate its duty of fair representation, the award of the Joint Committee in favor of the employer and against petitioners can now be treated as final. In other words, the issue is whether there is a fatal inconsistency between the Court of Appeal's reversal of the summary judgment in favor of the local union and its affirmance of the summary judgment in favor of the employer. It is to this issue alone that we shall address ourselves.

The starting point in "failure of fair representation" cases is *Humphrey* v. *Moore,* 375 U.S. 335, in which Justice White, speaking for a majority of the Court, pointed out that the essence of the charge is that

the employer violated the collective bargaining agreement and that the Union, by failing to fairly represent the employees in the grievance procedure, made it possible for the employer to successfully evade his obligation under the contract. Thus, the alleged "fraud" on the part of the Union, "if proved, would effectively undermine the decision of the Joint Committee as a valid basis for Moore's discharge" even though "no fraud is charged against the employer." (375 U.S. at 343) The majority therefore concluded that the action "is one arising under § 301 of the Labor Management Act." (Id.)

Following the law thus established in *Moore, supra,* the Court filled in the interstices in *Vaca* v. *Sipes,* 386 U.S. 171. Justice White, again speaking for the majority, held that the statutory obligation of the collective bargaining representative "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct" *(Humphrey* v. *Moore, supra)* was remediable either under § 301, which "permits suits for breach of a collective bargaining agreement regardless of whether the particular breach is also an unfair labor practice within the jurisdiction of the [NLRB]." The Court concluded that where it is alleged that an employer violated a collective bargaining agreement and that the union failed in its duty of fair representation, the damages sustained are primarily those caused by the employer's alleged breach of contract; and that the union's failure in its statutory duty "is no reason to exempt the employer from contractual damages he would otherwise have had to pay". The Court emphasized that "it is the employer's unrelated breach of the contract which triggered the controversy and which caused this portion of the employee's damages.

The employee should have no difficulty recovering those damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act. In fact, the employer may (and probably should) be joined in the fair representation suit, as in *Humphrey* v. *Moore, supra.* It could be a real hardship on the union to pay these damages, even if the union were given a right of indemnification against the employer. With the employee assured of direct recovery from the employer, we see no merit in requiring the union to pay the employer's share of the damages." (386 U.S. at 197).

Finally, in *Czosek* v. *O'Mara,* 397 U.S. 25, with Justice White again speaking for the Court, it was held:

> "Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharges, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and expense of collecting from the employer." (397 U.S. at 29)

Accordingly, a fair reading of *Humphrey, Vaca* and *Czosek* must lead to the following conclusions as applied to the instant case:

(1) The gravamen of the action under § 301 is that the employer breached a collective bargaining agreement.

(2) A ruling by an arbitration committee that there was no breach of agreement is normally final and binding.

(3) But if it is established that the union failed in its duty of fair representation in the handling of the

grievance then the issue of whether the arbitration award was vitiated by such failure, and, so, whether the employer did in fact breach the agreement in making the discharges, must also be decided.

(4) If both issues are decided in favor of petitioners then the damages to be assessed are (a) the wage loss, against the employer and (b) any additional damages which may have resulted from the union's breach of duty, against the union.

Accordingly, to dismiss against the employer at this stage, on the theory that it is entitled to the advantage of clearance by the arbitration committee, without a trial to determine whether such clearance was produced by a failure of fair representation by the union, is to ignore the teachings of *Humphrey, Vaca* and *Czosek*.

CONCLUSION

Respondent Local Union respectfully submits that the judgment of the Court of Appeals dismissing the Respondent Employer as a defendant in this litigation should be reversed.

Respectfully submitted,

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